In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOHN H. CHAFEE, SECRETARY OF THE NAVY, PETITIONER

v.

JOHN W. FLEMINGS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of John H. Chafee, Secretary of the Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit holding that respondent's 1944 court-martial conviction for auto theft must be vacated since it was not "service connected" under *O'Callahan* v. *Parker,* 395 U.S. 258, and that *O'Callahan* applies retroactively.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. B, *infra*) is reported at 330 F. Supp. 193.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on March 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the holding in *O'Callahan* v. *Parker*, 395 U.S. 258, should be applied retroactively to invalidate a conviction that had become final long before the date of that decision.

2. Whether respondent's 1944 court-martial conviction for stealing an automobile while he was absent without leave from his naval unit in wartime was "service connected" within the test of *O'Callahan* v. *Parker*, 395 U.S. 258.

STATEMENT

The relevant facts are set out in the opinion of the court of appeals (App. A 8–9). In 1944 respondent, then a seaman in the United States Naval Reserve stationed at the Naval Ammunition Depot in New Jersey, failed to return on time from a three-day leave. Subsequently, while absent without leave, he was arrested for auto theft in Pennsylvania by officers who discovered him in a car which had been stolen in Trenton, New Jersey, the previous day.[1] Respondent was transferred by the state police to military authorities who charged him with being absent without leave for thirteen days and with theft of an automobile from the possession of a civilian while the

[1] Respondent's complaint in this case (set forth in full in the Appendix to our brief in the court of appeals (C.A. App. 4a–5a), which we are lodging with the Clerk of this Court, makes it clear that the events giving rise to the car theft charge occurred while respondent was leaving his military station without permission. (According to respondent, he was given a ride in the car and then received permission to drive it away himself.) The events were thus not unrelated to his AWOL status.

United States was at war. At the court-martial proceedings held at the Brooklyn Navy Yard respondent, on the advice of military counsel, pleaded guilty to both charges. He was sentenced to three years' incarceration, loss of pay and a dishonorable discharge. After more than two years of confinement he was released and dishonorably discharged on October 23, 1946.

On June 2, 1969, this Court in *O'Callahan* v. *Parker*, 395 U.S. 258, held that courts-martial do not have jurisdiction over all offenses committed by servicemen but only over those which are "service connected." In October 1970 respondent filed the present action in the United States District Court for the Eastern District of New York seeking to overturn his 1944 court-martial conviction for auto theft and to compel the correction of his military records with respect to the dishonorable discharge.[2] He did not challenge the validity of his conviction for being absent without leave. On July 19, 1971, the district court, in a written opinion, held that the court-martial conviction for auto theft was invalid under *O'Callahan* and must be vacated. It remanded the case to the Board for Correction of Naval Records with instructions to change respondent's dishonorable discharge to a discharge of no greater disapprobation than bad conduct. 330 F. Supp. 193. On appeal, the Second Circuit affirmed, holding that respondent's auto theft conviction

[2] The action was stayed while respondent exhausted his military remedies—*i.e.*, the Judge Advocate General and the Board for Correction of Naval Records. These bodies denied his applications for correction of his military records on May 21 and 24, 1971, respectively.

was not "service connected" within the principles of *O'Callahan* and that the *O'Callahan* decision should be applied retrospectively (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

1. There is a conflict among the circuits over whether the holding of *O'Callahan* v. *Parker*, 395 U.S. 258, should be applied retroactively. Contrary to the holding below, the Fifth Circuit, in *Gosa* v. *Mayden*, 450 F. 2d 753, 766, petition for a writ of certiorari pending, No. 71-6314, and the Tenth Circuit, in *Schlomann* v. *Mosely*, No. 473-70, decided March 24, 1972, have recently determined that *O'Callahan* should not be given retroactive application, the position also taken by the Court of Military Appeals in *Mercer* v. *Dillion*, 19 U.S.C.M.A. 264, 41 C.M.R. 264.[3]

In *Relford* v. *Commandant*, 401 U.S. 355, this Court's grant of certiorari included the question of the retroactivity of *O'Callahan*. Although the Court did not reach the issue, it noted "that the retroactivity question has important dimensions, both direct and collateral * * *." 401 U.S. at 370. In *Gosa* v. *Mayden, supra*, we agree with petitioner that this Court should grant certiorari to resolve the conflict among the circuits. Particularly since this case involves an important question concerning the offenses

[3] The Court of Military Appeals did decide in *Mercer* that in the exercise of its supervisory function it would apply *O'Callahan* to court martial convictions pending on direct review. See *Enzor* v. *United States*, 20 U.S.C.M.A. 257, 43 C.M.R. 97.

reached by *O'Callahan*, we think it would be appropriate for the Court to hear this case as a companion to *Gosa*.

2. Whether *O'Callahan* bars court martial proceedings for auto theft committed by a serviceman who is absent without leave during wartime is an important question that this Court should decide. This Court has not spoken with respect to the application of *O'Callahan* to wartime offenses, although it has noted that the wartime court-martial power is considerably broader than in peacetime. See *Reid* v. *Covert*, 354 U.S. 1, 33–34; cf. *United States* v. *Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363. Particularly in light of the increased size of the military forces in wartime, this issue is one of great significance. It is arguable that, as to members of the armed forces themselves, in view of the increased need for discipline and morale, the wartime court-martial power is plenary and embraces all offenses. In the instant case, not only was the offense committed in wartime but during the time the defendant was absent without leave, a dereliction of duty over which the court-martial clearly had jurisdiction. Moreover, the theft of an auto, increasing the defendant's mobility, could well be said to have been in furtherance of unlawfully remaining absent without leave. In these circumstances, we think the court of appeals' holding that the auto theft charge was not "Service connected" was erroneous and should be reversed by this court.[4]

[4] The court of appeals indicated (App. A, *infra*, p. 13) that it reached its result in part because only two of the twelve factors enumerated in *Relford* militating in favor of court-martial jurisdiction were present: *i.e.*, lack of proper absence from the base and commission during wartime. The court did

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1972.

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not consider the fact that the auto theft could be deemed closely related to the military offense of being AWOL. Moreover, it is not the number of factors alone which should dictate the result, since not all the factors set forth in *Relford* have an equal bearing on the *O'Callahan* rationale. For example, the appellate courts have uniformly determined that where the offense did not occur within the United States, the service-connection test is automatically met (irrespective of any other factor) since the alternative to court-martial trial is trial by the foreign country without the benefit of the Fifth and Sixth Amendment rights to indictment by grand jury and a jury trial. See, *e.g.*, *United States* v. *Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64; *Gallagher* v. *United States*, 423 F. 2d 1371 (Ct. Cls.), certiorari denied, 400 U.S. 849; *Bell* v. *Clark*, 437 F. 2d 200 (C.A. 4); *Hemphill* v. *Mosley*, 443 F. 2d 322 (C.A. 10).

APPENDIX A

United States Court of Appeals for the Second Circuit

No. 528—September Term, 1971

No. 71-1997

UNITED STATES OF AMERICA, *ex rel.*
JOHN W. FLEMINGS, *Appellee*

—v.—

JOHN H. CHAFEE, SECRETARY OF THE NAVY,
Appellant

Before: KAUFMAN, MANSFIELD and OAKES, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York.

KAUFMAN, *Circuit Judge:*

Toward the end of its 1968 Term, the Supreme Court virtually sounded the death knell for court-martial jurisdiction which had been exercised over certain cases for more than fifty years. *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), decided that the Armed Services had no power to try servicemen for alleged crimes or offenses triable in civilian courts and which were without substantial military significance or "service connection." We are now asked to decide whether *O'Callahan,* which itself overturned a final conviction, applies retroactively to another court-

martial conviction for a non-service connected offense which became final prior to June 2, 1969, the date of that decision.[1]

John W. Flemings, in 1944 an eighteen-year-old seaman second class in the United States Naval Reserve stationed at the Naval Ammunition Depot in Earle, New Jersey, failed to return to his base after a seventy-two-hour leave. While AWOL, he was arrested for auto theft near Hollidaysburg, Pennsylvania, by Pennsylvania State Troopers who discovered him in an automobile which had been stolen the previous day in Trenton, New Jersey. The victim of the theft was a member of the United States Signal Corps who lived away from the naval base. The car was his personal property, he was on a purely personal errand in Trenton when the car was stolen, and at no time was he reimbursed by the military for any expenses incurred in the operation of the automobile. After being apprehended by the State Troopers, Flemings was transferred to military custody and incarcerated at Harts Island, New York. A court-martial subsequently was convened at the Brooklyn Navy Yard, the specification charging him with being AWOL for thirteen days and stealing an automobile "from the possession of a civilian." On the advice of military "counsel", he pleaded guilty and was sentenced to

[1] The Supreme Court in *Relford* v. *Commandant*, 397 U.S. 934 (1970), granted *certiorari* specifically to consider the issue raised here. In disposing of the case, however, the Court determined that Relford's offense was service connected and accordingly did not reach the retroactivity question. *Relford* v. *Commandant*, 401 U.S. 355, 369 (1971).

The United States Court of Military Appeals, the court of last resort for direct review of courts-martial convictions, *see* 10 U.S.C. § 867, has applied *O'Callahan* to all cases subject to direct review on the date of that decision. *E.g.*, *United States* v. *Borys*, 18 U.S.C.M.A. 259 (1969); *United States* v. *Prather*, 18 U.S.C.M.A. 560 (1969).

incarceration for three years, loss of his pay and a dishonorable discharge.[2]

In the wake of *O'Callahan* and long after the completion of his prison sentence,[3] Flemings now seeks to have his conviction vacated and his discharge changed to honorable, contending that the auto theft was not service connected and thus not a proper basis for court-martial jurisdiction. This action was brought in the Eastern District of New York.[4] Judge Weinstein, in a carefully considered opinion, decided that the theft of the automobile by Flemings [5] was not service connected and that the conviction for that offense was void under *O'Callahan* because the court-martial lacked subject matter jurisdiction. He remanded the case to the Board for Correction of Naval Records with instructions to vacate the conviction and the dishonorable discharge and to enter a discharge no

[2] The maximum punishment for two weeks unauthorized absence—the offense which admittedly was service connected within the meaning of *O'Callahan*—was only six months' confinement, loss of pay and allowances, reduction to the lowest enlisted pay grade and a bad conduct discharge.

[3] Flemings served twenty-six months in prison and was dishonorably discharged on October 23, 1946.

[4] The action was stayed while Flemings exhausted his administrative remedies. Flemings's applications for correction of his military records were denied by the Judge Advocate General and the Board for Correction of Naval Records, respectively, on May 21 and 24, 1971.

[5] It is of some interest that Flemings alleged before Judge Weinstein that he was innocent of the charge of auto theft. He claimed that another sailor picked him up while he was hitchhiking and that he never had knowledge that the automobile had been stolen. The sailor, according to Flemings, had left the car for a short while to visit a friend and fled when he saw the State Troopers arresting Flemings.

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worse than bad conduct.[6] 330 F.Supp. 193 (E.D.N.Y. 1971). From this determination the government appealed. We affirm the district court.[7]

I.

The threshold question is whether the offense of stealing a privately owned automobile, not being utilized for military purposes, while it was parked on a Trenton, New Jersey street, was "service connected." In *O'Callahan* the Court was faced with harmonizing the constitutional power of Congress to make "Rules for the Government and Regulation of the land and

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[6] There is no claim that the conviction for being AWOL, which carried with it a potential bad conduct discharge, is invalid.

[7] Other courts which have considered the question presented to us have held that courts-martial convictions for non-service connected offenses which became final before June 2, 1969, are not subject to collateral attack under *O'Callahan*. *Gosa* v. *Mayden*, 450 F.2d 753 (5th Cir. 1971); *Schlomann* v. *Moseley*, No. 473-70 (10th Cir. Mar. 24, 1972); *Thompson* v. *Parker*, 308 F.Supp. 904 (M.D. Pa.), *appeal dismissed*, No. 18, 868 (3d Cir. April 24, 1970); *Mercer* v. *Dillon*, 19 U.S.C.M.A. 264 (1970).

The following commentators have predicted or favored retroactively: Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L.J. 551 (1972); Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan* v. *Parker*, 9 Washburn, L.J. 193 (1970); Note, *O'Callahan* v. *Parker, A Military Jurisdictional Dilemma*, 22 Baylor L. Rev. 64 (1970); Note, *Denial of Military Jurisdiction over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts*, 64 Nw. U.L. Rev. 930 (1970).

Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan* v. *Parker*, 54 Minn. L. Rev. 1 (1969); Note, 44 Tulane L. Rev. 417, 424 (1970), do not favor retroactivity.

For a compilation of general commentaries on *O'Callahan*, see *Relford* v. *Commandant*, 401 U.S. 355, 356 n. 1 (1971).

naval forces," Art. I, § 8, cl. 14, with the constitutional guarantees of an indictment by a grand jury [8] and a trial by a jury of one's peers.[9] The Court recognized that "the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply," 395 U.S. at 261, but added emphatically that Article I, section 8, clause 14, read in conjunction with the "necessary and proper" clause,[10] authorizes Congress only to invest military courts with " ' *"the least possible power adequate to the end proposed."* ' " *Id.* at 265, quoting *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 23, (1955), quoting *Anderson* v. *Dunn,* 19 U.S. (6 Wheat.) 204, 231 (1821). Article I is a narrow concession to military need, not to be read expansively as licensing broad-based exceptions to the protective benefits afforded by civilian trials.

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[8] The fifth amendment provides in part: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

The phrase "when in actual service in time of War or public danger" modifies only "Militia." *See, e.g., Johnson* v. *Sayre,* 158 U.S. 109, 114 (1895).

[9] Article III, section 2, clause 3 provides: The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The six amendment provides in part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

[10] Article I, section 8, clause 18 empowers Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ."

Accordingly, the Court held that the military status of the defendant was not *ipso facto* sufficient to establish court-martial jurisdiction. It instructed that the nature, the time and the place of the offense must be "service connected," thereby posing a threat to the "special needs of the military." But words, even in their literal sense, frequently require further elucidation. Thus, two years later, in *Relford* v. *Commandant,* 401 U.S. 355, 365 (1971), the Court enumerated the eleven factors which led it to conclude that O'Callahan, who was charged with assault and attempted rape while on an evening pass from his army post in Hawaii, was not properly court-martialed:

1. The serviceman's proper absence from the base.

2. The crime's commission away from the base.

3. Its commission at a place not under military control.

4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

6. The absence of any connection between the defendant's military duties and the crime.

7. The victim's not being engaged in the performance of any duty relating to the military.

8. The presence and availability of a civilian court in which the case can be prosecuted.

9. The absence of any flouting of military authority.

10. The absence of any threat to a military post.

11. The absence of any violation of military property.

Relford listed a twelfth factor implicit in the eleven considered in *O'Callahan*—"The offense's being among those traditionally prosecuted in civilian courts."

Clearly, each case must be approached *ad hoc* in light of the many factors to be considered. *Id.* at 365–66. But the balance must be struck on qualitative as well as quantitative grounds. Relford, for example, was charged with the rape of a girl and a woman on the Fort Dix, New Jersey, military reservation. The fourteen year old girl, a sister of a serviceman stationed at Fort Dix, was abducted at the point of a knife while waiting for her brother on a base parking lot; the woman, who worked as a waitress at the post exchange and was the wife of an Air Force man stationed at the adjacent McGuire Air Force Base, was driving to work when she too was abducted at the point of a knife and then raped at the fort's training area. Consideration of factors 4, 6, 8, 11 and 12 and perhaps 5 and 9 weighed against court-martial jurisdiction, while factors 1, 2, 3, 7 and 10 supported jurisdiction. *Id.* at 366. The court-martial conviction was sustained, Justice Blackmun stating for the court "that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial." *Id.* at 369.

In the case before us, it would appear that only factors 1 and 5 support court-martial jurisdiction; Flemings was AWOL, and in 1944 the United States was engaged in World War II. Accordingly, the government argues that the confluence of these two fac-

tors was sufficient to sustain court-martial jurisdiction. We do not agree.

The United States Court of Military Appeals, in considering this question, has instructed that AWOL status *ipso facto* will not confer court-martial jurisdiction over a civilian offense committed while AWOL. *See, e.g., United States* v. *Armes,* 19 U.S.C. M.A. 15 (1969) (no jurisdiction where defendant stole a car while AWOL).[11] We are not to be understood, however, as suggesting that an unauthorized absence is not a more serious breach of military duty and a greater threat to military discipline during wartime than in peacetime. No court has ever challenged the power of the military to deal swiftly with that offense, and, in doing so, to consider the relative threat it posed to the military's mission. Because the military can protect its special needs by asserting court-martial jurisdiction over the purely military offense of being AWOL, it is inappropriate for it to urge that the "paramount" nature of military discipline during wartime justifies it in sweeping within the jurisdiction any offense committed by a serviceman—no matter where—even when that offense by itself has no inherent relationship to the war effort and in no way hinders that effort. Flemings' offense was not committed on a military installation nor was it violative

[11] *Armes* is strikingly similar to this case. Armes, while AWOL (but wearing his fatigue uniform), stole the car of a retired Army major. It should be noted that *Relford* did not enumerate as a relevant factor that the serviceman was in or out of uniform. The Military Court of Appeals has considered the wearing of a uniform relevant to court-martial jurisdiction only where the uniform facilitated the crime. *See, e.g., United States* v. *Peak,* 19 U.S.C.M.A. 19 (1969); *United States* v. *Morisseau,* 19 U.S.C.M.A. 17 (1969). In any event, Flemings has alleged that he left Fort Dix in civilian clothes and did not wear his uniform again until after he was arrested.

of a person or of property located there, as in *Relford*. Although the car Flemings allegedly stole while it was parked on a street in Trenton belonged to a member of the Signal Corps, that fact was a "happenstance" with "no military significance." *Id.* at 16. The government does not suggest that the theft interfered in any way with the owner performing his military duties.[12]

We conclude that under these circumstances, the fact that this car theft occurred during wartime bore no special relevance to military discipline. Accordingly, this factor is deserving of little weight under the *Relford* equation. The other circumstances tilt the *Relford* scale heavily in favor of our conclusion that the auto theft was not service connected: one, the crime, traditionally prosecuted by civilian authorities, was not committed on a military installation or in an area subject to military control; two, neither the defendant nor the victim were engaged in military duties at the time of the crime; three, there was no threat to the security of a military post or violation of military property and no direct flouting of military authority; and finally, the civilian courts were open and readily available in 1944 to prosecute the offense. Under these circumstances, we do not perceive any special needs of military discipline which justified encroaching on the benefits of civilian trial and the guarantees of Article III and the fifth and sixth amendments.

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[12] The argument has been made that detention and prosecution by state authorities might have prevented Flemings from being present to perform *his* military duties, *see O'Callahan* v. *Parker*, 395 U.S. at 282–83 (Harlan, *J.* dissenting), but the evidence does not indicate that Flemings was in any way indispensable to his unit, and the government's conduct in transferring Fleming to Hart Island makes clear that his contribution to the war effort was not required.

II.

We turn now to a consideration of the more difficult question presented—whether *O'Callahan* v. *Parker, supra,* should be applied retrospectively.

Until its decision in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Supreme Court "without discussion, [had] applied new constitutional rules to cases finalized before the promulgation of the rule." *Id.* at 628. But, commencing with *Linkletter,* which decided that *Mapp* v. *Ohio,* 367 U.S. 643 (1961),[13] would not apply to cases which had become final before the decision in *Mapp* was filed, the Court has applied a three-pronged interested balancing test in, deciding whether *new pronouncements of criminal procedure* will be applied retroactively or only prospectively.[14] We emphasize that this new approach has been applied only to cases establishing new rules of criminal procedure. *See Adams* v. *Illinois,* 40 U.S.L.W. 4255, 4256 (U.S. Mar. 7, 1972). The classic statement of the test appeared in Justice Brennan's opinion in *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967):

> The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administra-

[13] *Mapp,* overruling *Wolf* v. *Colorado,* 338 U.S. 25 (1949), held that the due process clause of the fourteenth amendment required state courts to exclude evidence seized in violation of the search and seizure provisions of the fourth amendment.

[14] The Supreme Court cases applying the *Linkletter* doctrine, excluding those cases decided during the latter part of the 1970 Term, are catalogued in the appendix to the opinion of our venerable brother, Judge Medina, in *United States* v. *Liguori,* 439 F. 2d 663, 670–76 (2d Cir. 1971).

tion of justice of a retroactive application of the new standards.

The government, relying heavily on the decision of the Fifth Circuit in *Gosa* v. *Mayden*, 450 F.2d 753, 758 (5th Cir. 1971), argues that the retroactivity *vel non* of *O'Callahan* should be scrutinized under *Linkletter* and its progeny notwithstanding that the result in *O'Callahan* turned on the lack of subject matter jurisdiction and not a new rule of criminal procedure.

A. THE RATIONALE OF O'CALLAHAN—JURISDICTION

The rationale of *O'Callahan* was founded on the concept of jurisdictional power in the traditional sense and not on functional or procedural deficiencies which are considered an abuse of properly vested adjudicatory power. *See Gosa* v. *Mayden*, 450 F.2d at 756–57; *Schlomann* v. *Mosley*, No. 473–70 (10th Cir. Mar. 24, 1972); U.S. *ex rel. Flemings* v. *Chafee*, 330 F.Supp. at 195–97; Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 212 (1969); *but see Mercer* v. *Dillon*, 19 U.S.C.M.A. 264 (1970). As we discussed at the outset, the court in *O'Callahan* sought to define what offenses Congress, without exceeding the constitutional limits of Article I, section 8, could authorize the military to try by court-martial. The court stated its holding unequivocally in terms of "jurisdiction" in the traditional sense: "We have concluded that the crime to be under *military jurisdiction* must be service connected. . . ." 395 U.S. at 272 (emphasis added). If the Court's opinion leaves any doubt as to its meaning, and we do not believe it does, it is obviated by Mr. Justice Harlan's dissent which succinctly framed the issue confronted by the Court as one of "subject matter jurisdiction of courts-martial." *Id.* at 276.

The Court stressed the procedural differences between the operation of Article III courts and courts-

martial to emphasize that an unwarranted extension of court-martial jurisdiction would encroach on the fundamental constitutional rights of grand jury indictment and trial by petit jury—which Justice Douglas, writing for the Court, referred to as the "constitutional stakes" of the litigation. *Id.* 262. In construing the decision, it is important to note that the Court did not in any sense "reform" court-martial procedures or suggest that current procedures are inadequate in trials for offenses which are service connected. Nor did the Court suggest that courts-martial constitutionally could assume jurisdiction over offenses which are not service connected if they provided the protective benefits of grand jury indictment and trial by jury. Thus, we see no basis for concluding that this case fits within the same mold as *Mapp* and others where convictions were overturned not because the trial court lacked adjudicatory power, but because procedures were constitutionally defective and thus merely an abuse of properly vested adjudicatory power.

B. RETROACTIVITY AND JURISDICTIONAL DEFECT

The important question we must resolve cannot be considered without reference to the rich history elucidating the effect of an unconstitutional law. Almost 100 years ago, in *Ex parte Siebold,* 100 U.S. 371, 376–77 (1879), the Supreme Court stated that "[a]n unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *See also Norton* v. *Shelby County,* 118 U.S. 425, 442 (1886); *Chicago, I & L. Ry.* v. *Hackett,* 228 U.S. 559, 566 (1913). This doctrine—that convictions rendered by a court lacking either personal or subject matter jurisdictions

are void—has been a fundamental part of our common law jurisprudence. Accordingly, even at a time when issues cognizable in habeas corpus proceedings were severely limited, civilian courts exercised collateral review of courts-martial convictions where lack of jurisdiction was alleged. *See McClaughry* v. *Deming*, 186 U.S. 49 (1902); *Ex parte Reed*, 100 U.S. 13 (1879), Note, *Developments in the Law-Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1209 (1970).

We are not suggesting for a moment that courts-martial are a modern-day Star Chamber or no more than sophisticated kangaroo courts, but we assert confidently that trial in an Article III court is "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, *J.*). Courts-martial, however, which derive their power from the congressional authority reposed in Article I, section 8, clause 14, are the fulcrum of "a system of military justice with fundamental differences from the practices in the civilian courts." *O'Callahan* v. *Parker*, 395 U.S. at 262. Thus, when military jurisdiction exceeds its "proper domain," *id.* at 265, it treads on the command that *no person* shall be deprived of life, liberty or property without due process of law, albeit that its procedures may not shock our conscience.[15]

In our view, the recent Supreme Court cases denying retrospective application to new rules of criminal procedure where, and only where, as we shall see

[15] The grant of power in clause 14 is basically a response to the abuses of royal prerogative, or, in our frame of reference, the potential of unbridled executive discretion. That the Constitution shifted the focus of control from the executive to the legislative branch does not mean that "Congress might legislate at will with regard to members of the armed forces." Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435, 447–49 (1960).

below, the old rules did not threaten the basic integrity of the court's truth determining process, are not compelling precedent when applied to a case founded on an absence of jurisdiction or power over the subject or person. Not one of the cases establishing a new principle which was limited to prospective application involved a total absence of adjudicatory power. Moreover, if some decisions which were not based upon concepts of jurisdictional competence have been applied retroactively, *see e.g., Witherspoon* v. *Illinois,* 391 U.S. 510 (1968); *Roberts* v. *Russell,* 392 U.S. 293 (1968), *a fortiori* a case which rests on lack of jurisdiction in the traditional sense and seeks to preserve the basic integrity of the institutions which enforce our criminal laws, must be so applied. *See United States* v. *United States Coin & Currency,* 401 U.S. 715, 724 (1971) (Harlan, *J.*).

The government argues that the *Linkletter* line of decisions must be read in light of *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940), and that when so done, authority exists for denying retroactive effect to *O'Callahan.* In *Chicot,* bondholders of a state drainage district who had been parties to a debt readjustment proceeding under a federal statute sought to recover on the original bonds, alleging that the debt readjustment was invalid because the statute subsequently had been declared unconstitutional. The Supreme Court recognized that the court which decreed the readjustment did not have subject matter jurisdiction, but nevertheless applied the doctrine of *res judicata* in denying the bondholders relief. *Chicot,* however, was not a criminal case, nor was it concerned with the liberty or the fundamental rights to a fair trial. *See generally* Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior*

Decisions, 60 Harv. L. Rev. 437, 446–48 (1947). *But cf. Warring* v. *Colpoys,* 122 F.2d 642 (D.C. Cir.), *cert. denied,* 314 U.S. 678 (1941). *Chicot* was a civil proceeding concerned simply with whether a debt was still owing. Although the doctrine of finality bears an important place in the jurisprudence of criminal law, *see* Bator, *Finality in Criminal Law and Federal Habeas Corpus,* 76 Harv. L. Rev. 441 (1963), it is "more firmly settled in the context of civil litigation." Mishkin, *The Supreme Court, 1964 Term—Foreward: The High Court, The Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 56, 77 (1965). The primary function of habeas corpus is "to secure individual freedom from unjustified confinement," even though the petitioner may be confined pursuant to a final judgment, *Id.* at 79. Moreover, *Chicot* involved vested rights of third parties who, relying in good faith on the seeming validity of the Court's decree readjusting the debt, purchased new bonds. It would have been strikingly unjust to deprive these third parties of vested rights when the original bondholders had failed to raise any constitutional objections during the readjustment proceedings and before the rights had vested.

The recent decision in *United States* v. *United States Coin & Currency, supra,* buttresses our conclusion that *Chicot* should not be transported *ipse dixit* to the arena of criminal litigation. *Coin* involved an action by the government for forfeiture of money allegedly used in illegal bookmaking operations. *See* 26 U.S.C. § 7302. Subsequently, the Supreme Court voided the Internal Revenue laws which were the basis of the forfeiture proceeding. *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968). The government urged that *Marchetti* and *Grosso* should not be given retro-

active application because an overwhelming number of suits would be commenced by gamblers who had been subjected to forfeitures in earlier proceedings and would now seek to reclaim their property. In rejecting this contention, Justice Harlan, in a characteristically scholarly opinion, adhered rigidly and categorically to the concept that judgments of a court without subject matter jurisdiction were void. 401 U.S. at 723–24.

We draw further support from *North Carolina* v. *Pearce,* 395 U.S. 711 (1969). The Court decided *inter alia,* that *Benton* v. *Maryland,* 395 U.S. 784 (1969), which held that the fifth amendment guaranty against double jeopardy is enforceable against the states, would apply retroactively. *Benton,* we note, is similar to *O'Callahan* in that Benton's conviction was overturned because, under the double jeopardy clause, he should not have been retried. Accordingly, the trial court was devoid of subject matter jurisdiction. Although *Linkletter* had been decided more than four years before, and the doctrine of prospective limitation had become a familiar tool of appellate decision, it was so clear to the *Pearce* Court that *Benton* should be applied retroactively that it did not even discuss the application of *Linkletter.*

III.

Although we conclude that *O'Callahan* must be applied retroactively because that decision was grounded in the absence of jurisdiction to adjudicate, we feel obliged to indicate that our application of the *Linkletter* doctrine to *O'Callahan* also would lead us to conclude, unlike other courts,[16] that *O'Callahan* must be applied retroactively.

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[16] *See* note 7 *supra.*

A. THE PURPOSE TO BE SERVED

The initial and most crucial question to be asked in deciding whether a new ruling is to be applied retroactively is what purpose or objective was to be achieved by the new standard. *See, e.g., Williams* v. *United States,* 401 U.S. 646, 653 (1971) (opinion of White, *J.*). The underlying goal of *Mapp* v. *Ohio,* for example, was to deter state authorities from conducting illegal searches and seizures by imposing the sanction of excluding the evidence seized. This principal purpose—future deterrence—would not have been enhanced by overturning past convictions based on illegally seized evidence. The end to be served by *O'Callahan,* however, was to afford a serviceman charged with a non-service connected crime committed off-post with at least the benefits of grand jury indictment and trial by petit jury before he could be deprived of his liberty or property. Retroactivity achieves this objective.

But, that does not end our inquiry, for even if a new standard is designed to insure the fairness of a trial and preserve the integrity of the fact-finding process, it does not follow that it will be applied retroactively if the old standard did not present a "clear danger of convicting the innocent." *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406, 416 (1966).[17] The courts that have concluded that *O'Callahan* should not be applied retroactively have relied heavily on *De Stefano* v. *Woods,* 392 U.S. 631 (1968), which considered the retroactivity of *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), and *Bloom* v. *Illinois,* 391 U.S. 194 (1968). *Duncan* applied the sixth amendment to the states through the fourteenth amendment and required the

[17] This assumes, of course, that there was justifiable reliance on the old standard and that retroactive application would adversely affect the administration of justice.

states to provide jury trials in serious criminal cases; *Bloom* extended the right to jury trial to state trials for serious criminal contempt. *De Stefano,* although recognizing retrial for those who had been subjected to the procedures now declared unconstitutional would afford them the coveted right to a jury trial, decided against retroactive application. After quoting from *Duncan:*

> We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury,

the Court concluded:

> The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial.

392 U.S. at 634.

Although the basic values served by the decisions in *Duncan* and *Bloom*, and in *O'Callahan* are similar, the Supreme Court instructed in *Johnson* v. *New Jersey,* 384 U.S. 719, 728–29 (1966), "whether a rule of criminal procedure does or does not enhanced the reliability of the fact-finding process at trial is necessarily a matter of degree." The facts and *ratio decidendi* of *O'Callahan* undermine any compelling analogy between this case and *De Stefano.*

Justice Douglas, writing for the majority in *O'Callahan,* quoted extensively from *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11 (1955), which decided that a serviceman could not be subjected to court-martial after he has been discharged. Particularly pertinent was the Court's observation in *Toth* "that

military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Id.* at 17. A brief overview of some of the procedures applicable when Flemings was court-martialed will reveal that this statement is not to be taken with a grain of sand or as evidencing a mere "belief that a civilian court trial with grand and petit jury protections would tend to prevent arbitrariness and repression and be fairer." *Gosa* v. *Mayden,* 450 F. 2d at 765. Indeed, Justice Douglas's appraisal was based on the procedures afforded after the Uniform Code of Military Justice was adopted in 1950. 10 U.S.C. § 800 *et seq.* We need not speculate as to how much greater the discrepancy must have been between Article III courts and courts-martial before its adoption.[18] But, Senator Ervin of North Carolina was moved to comment:

> Prior to 1950 the American in uniform had been at the mercy of legal procedures little changed since before the Revolutionary War, procedures originally designed for mercenaries—not for citizen soldiers loath to give up the rights they were defending. So antiquated and unjust was the system that after World War II a great protest came from returning veterans demanding reforms which would guarantee to servicemen basic principles of due process of law.

[18] In some respects many court-martial procedures now compare favorably with practices in civilian courts. *See generally* Quinn, *Some Comparisons Between Courts-Martial and Civil Practice,* 15 U.C.L.A. L. Rev. 1240 (1968).

115 Cong. Rec. S 6760-61 (Daily ed. June 19, 1969).

At the time of Flemings's court-martial the fact-finding body consisted of a panel of officers hand-picked by the officer convening the court-martial. Since his officer normally had direct command authority over the members of the panel—who could convict by a bare majority—it is realistic to assume that there was an ever-present danger of command influence. *See O'Callahan* v. *Parker,* 395 U.S. at 264 & n.5. Each member took his place, heard the evidence, and rendered his opinion, fully aware of the implications inherent where the commanding officer convened the court, and selected its members and the counsel on both sides. Moreover, the pervasive atmosphere of the court-martial process was the "age-old manifest destiny of retributive justice." *Id.* at 264.

The relative deficiencies of Flemings's court-martial procedures were not limited to the reliability of the fact finder. The record in this case reveals that Flemings was represented by "counsel." But, under regulations applicable in 1944, "counsel" was an officer assigned to assist the accused; there was no requirement that he have legal training.[19] In addition, the right to compulsory process for obtaining evidence and witnesses was, to a significant extent, dependent on the approval of the prosecution. *Id.* at 264 n. 4. This limitation could be particularly devastating to the defense, because courts-martial often were not convened in the vicinage where the alleged offense was

[19] Naval Courts and Boards, Ch. IV, § 358 (1937). We note that the right to appointed counsel when one is charged with a serious offense, although applied to the states for the first time in 1963, is considered so fundamental to a fair trial that it has been applied retroactively. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

committed.[20] Flemings, for example, was court-martialed at the Brooklyn Navy Yard in Brooklyn, New York, although the car was stolen in Trenton, New Jersey, and he was arrested near Hollidaysburg, Pennsylvania. Any likely witnesses, therefore, were located in New Jersey or Pennsylvania. Clearly, the procedures were not conducive to the effective presentation of a defense.[21]

The obvious conclusion, and one warranted by the Court's thorough discussion in *O'Callahan* and *Toth*, is that the court-martial procedures employed there raised a "clear danger of convicting the innocent." *Tehan* v. *United States ex rel. Shott*, 382 U.S. at 416. Justice White's discussion of the *Linkletter* line of decisions sets forth the rationale in pithy fashion:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the crim-

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[20] Flemings claims, as a separate ground for relief, that he was denied the right to trial in the vicinage guaranteed by Article III, section 2, clause 3:

> The trial of all crimes, except in cases of impeachment, shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

In light of our conclusion that *O'Callahan* must be applied retroactively, we do not reach this question.

[21] In comparing *O'Callahan* to *Duncan* with respect to *DeStefano* and concluding that it "could not assert that every criminal trial or any particular trial by court-martial is unfair or that an accused may never be as fairly treated by members of a military court as he would by a civilian jury," the Court of Military Appeals noted that in many cases that would be affected by a retroactive application of *O'Callahan*, the accused had pleaded guilty. How could it be argued, it asked, that the accused in such a case had been subjected to an unfair trial on the issue of guilt. *Mercer* v. *Dillon*, 19 U.S.C.M.A. at 268. The answer comes quickly that the court-martial procedures we have described certainly would weigh heavily in inducing the accused to plead guilty.

inal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. Williams v. United States, 401 U.S. at 653 (footnote omitted).[22]

B. Impact of Retroactivity [23]

We are told that retroactive application of *O'Callahan* may require the Armed Forces to vacate thou-

[22] See cases cited in *Williams* v. *United States*, 401 U.S. at 653 n. 6.

[23] Although the history of "reliance" by the military is of some interest, we believe it would unduly protract this opinion to deal at great length with this element, particularly when that history is so abstruse. Courts-martial have exercised their jurisdiction over so-called "civilian" crimes pursuant to congressional authorization, since 1916. Act of August 29, 1916, Ch. 418 § 1342, 39 Stat. 650; *see Duke* and *Vogel*, *supra*, 13 Vand. L. Rev. at 449–53. Although this jurisdiction was not supported by any prior holding of the Supreme Court, language in several cases supports an inference that mere military status was sufficient to permit trial by court-martial. *See, e.g.*, *Ex parte Mulligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Coleman* v. *Tennessee*, 97 U.S. 509 (1878); *Smith* v. *Whitney*, 116 U.S. 167, 184–85 (1886); *Johnson* v. *Sayre*, 158 U.S. 109, 114 (1895); *Grafton* v. *United States*, 206 U.S. 333, 348 (1907); *Reid* v. *Covert*, 354 U.S. 1, 22–23; *Kinsella* v. *Singleton*, 361 U.S. 234, 240–43 (1960).

Nevertheless, a line of Supreme Court cases steadily had narrowed the permissible limits of court-martial jurisdiction from jurisdiction over civilians bearing a remote relationship to the Services to jurisdiction over those actually serving. These cases emphasized the same constitutional considerations which led the

sands of court-martial convictions.[24] Not only will discharge records have to be changed, but questions of retroactive pay and veterans benefits will be involved. At first blush the administrative burden might appear staggering, but, in actuality, the great bulk of claims will entail routine processing. Each branch of the Armed Services already has a Board for Correction of Military Records, *see* 10 U.S.C. § 1552(a), which has established procedures for handling such claims. It is more significant, however, that very few servicemen have sought collateral review of their convictions under *O'Callahan*. *See* Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 Geo. L.J. 551, 578 & n. 141. The burden would be reduced further, as Judge Weinstein suggested in his opinion below, if Congress were to adopt a short statute of limitations for those who would apply for retroactive benefits.

Nor do we envision a significant impact on the administration of justice. Federal courts may be called upon where a serviceman has been denied an administrative remedy on the ground that his offense was service connected. Although *O'Callahan* gave little guidance on this question, *Relford*, while adhering to

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O'Callahan Court to the service-connection test. *See, e.g., United States ex rel. Toth* v. *Quarles*, *supra* (discharged servicemen cannot be court-martialed); *Reid* v. *Covert*, 354 U.S. 1 (1957) (civilian employees of military personnel accompanying them overseas cannot be court-martialed); *McElroy* v. *Guagliardo*, 361 U.S. 278 (1970) (civilian employees of Armed Forces overseas not subject to court-martial). Since *O'Callahan* was not an abrupt change of direction for the Court, but a marked extension of a discernible trend, its coming "was clearly prophesied, if one had the ears to hear and the eyes to read." *Mercer* v. *Dillon*, 19 U.S.C.M.A. at 273 (Ferguson, J., dissenting).

[24] See the statistics collected in Blumenfeld, *supra*, 60 Geo. L.J. at 578–81.

an *ad hoc* approach, indicates that the single most important factor will be whether the offense occurred on base. We would expect that a large number of cases will be easily disposed of under this standard.

O'Callahan, decided more than two years ago, has yet to stir an influx of litigation which threatens to overwhelm the floodgates.

We cannot conclude without discussing the far-reaching institutional considerations which govern and reinforce our conclusion that *O'Callahan* must be applied retroactively. The litany that judicial decisions must be so applied, traceable to Blackstonian concepts, is firmly embedded in the development of our common law jurisprudence. *See generally* Mishkin, *supra*, 79 Harv. L. Rev. at 58–76. Although *Linkletter* departed from this norm, it did so only "in the interest of justice." 381 U.S. at 628. Nevertheless, the Court did apply the exclusionary rule of *Mapp* v. *Ohio* to Mrs. Mapp herself and to all cases pending on direct review at the time of the decision, even though to do so did not foster the primary purpose of *Mapp*—to deter future searches and seizures in violation of the fourth amendment. With the passage of time, the Court hesitated to apply new decisions even to cases on direct review. For example, the principles of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were applied only to trials commenced after the dates of those decisions. *Johnson* v. *New Jersey*, 384 U.S. 719, 733 (1966). Justice Harlan has forcefully characterized this as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule * * *." *Mackey* v. *United States*, 401 U.S. 667, 679 (1971).

Whether or not one agrees with Justice Harlan's view that this is "an indefensible departure from [the timeworn] model of judicial review," *id.*, or with Justice Douglas that it is "inherently invidious," *Adams* v. *Illinois*, 40 U.S.L.W. at 4258 (dissenting), the evils would be all the more apparent and the injustices all the more pronounced if the Court were to snare one case (*O'Callahan's*) from the realm of finality, relieve the petitioner of a claimed and now recognized injustice, but relegate all others subject to the same injustice to the fate of not having been the lucky chosen one. That is what the government now urges. We must remember that it was in a habeas corpus proceeding that the Supreme Court in *O'Callahan* afforded relief from a final conviction.

To our knowledge, the Supreme Court always has applied new rules announced in habeas corpus cases retroactively. *See, e.g., Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Jackson* v. *Denno*, 378 U.S. 368 (1964). This is hardly surprising, however, for the reason lies in the very function of the writ as explained by Justice Brennan in the landmark decision of *Fay* v. *Noia*, 372 U.S. 391, 401–02 (1963):

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints.

There is no indication whatsoever that in deciding to grant O'Callahan's petition the Supreme Court intended to depart from the traditional concept of the Great Writ. The identical principles which were at stake in *O'Callahan* and motivated the Court to grant

collateral relief compel us to hold that Flemings is entitled to the same collateral relief.

Finally, we reiterate that we are not concerned here merely with defects in the procedures employed at Flemings's court-martial, but as the *ratio decidendi* of *O'Callahan* made clear, with the total absence of power to judge him.

The Court is grateful to Michael Meltsner, Esq., who, as assigned counsel, represented appellee with skill.

Judgment affirmed.

APPENDIX B

UNITED STATES OF AMERICA EX REL.
JOHN W. FLEMINGS, PLAINTIFF
v.
HON. JOHN H. CHAFEE, SECRETARY OF THE NAVY,
DEFENDANT

No. 70–C–1267

United States District Court,

E. D. New York

July 19, 1971

MEMORANDUM AND ORDER

WEINSTEIN, *District Judge.*

This is an action to overturn a 1944 court-martial conviction for automobile theft and to compel the correction of military records from a dishonorable discharge to a general discharge under honorable conditions. Both parties have moved for summary judgment. Since the crime was not service related, the court-martial had no jurisdiction, the conviction was void, and the discharge records must be corrected.

I. FACTS

The material facts are undisputed. In August, 1944, plaintiff, then eighteen years old, was a seaman second class in the United States Naval Reserve. He was granted permission to leave his base, the Naval Ammunition Depot, Earle, New Jersey, for 72 hours but failed to return on time. While absent without official leave, he was arrested for automobile theft by Penn-

sylvania State Troopers near Hallidaysburg, Pennsylvania.

Transferred to military custody, plaintiff was incarcerated at Harts Island, New York. Court-martial proceedings were held at the Brooklyn Navy Yard before a court of retired senior naval officers. On advice of military counsel, he pled guilty to the charges of automobile theft and of being absent without leave for thirteen days. He was sentenced to three years incarceration, loss of pay and a dishonorable discharge. The maximum punishment at that time for a two week unauthorized absence was confinement for six months plus the period of absence, loss of all pay and allowances during a like period, reduction to the lowest enlisted pay grade, and a bad conduct discharge. After 26 months of confinement, during which he was repeatedly disciplined for infractions, plaintiff was released and dishonorably discharged.

The automobile had been stolen while it was parked on a street in Trenton, New Jersey, the day before plaintiff was arrested. The owner, a member of the United States Signal Corps, did not witness the theft; he lived off base and received no compensation from the military for the car's use. He was on a personal errand in Trenton when the vehicle was stolen. The court-martial specification itself charges plaintiff with stealing an automobile "from the possession of a civilian."

Plaintiff alleges that he had been hitchhiking—in civilian clothes according to his own supplemental affidavit—when he was picked up by another sailor in the automobile; that he was merely a passenger; and that he was not aware that it was stolen. According to him, the driver stopped beside the highway to visit a friend in a nearby farmhouse. While plaintiff

was waiting in the car the arresting state troopers stopped to investigate. He alleges that as they talked with him the troopers saw the other sailor running away. It is his contention that his version of the story was corroborated by the state troopers' interview of a gas station attendant shortly after the arrest.

Both parties agree that all administrative remedies have been exhausted. The Judge Advocate General has ruled that no action to modify the sentence is warranted. The Board for Correction of Naval Records has denied plaintiff's request for reconsideration of his application for correction of his military records. The case is ripe for adjudication.

Defendant does not now contest this Court's jurisdiction to review the refusal of the Board for Correction of Naval Records to grant the petition for a change in the form of plaintiff's discharge. 28 U.S.C. § 1361; Ashe v. McNamara, 355 F.2d 277, 282 (1st Cir. 1965). *Cf.* Smith v. Resor, 406 F.2d 141, 146–147 (2d Cir. 1969).

II. VENUE

Though not raised in the answer, lack of venue has been asserted in a subsequent motion to dismiss.

[1, 2] Venue is properly laid, among other places, in the judicial district where the "cause of action arose." 28 U.S.C. § 1391(e). The "cause of action" in this case may, as defendant asserts, have arisen in Washington, D.C., the district where the Board for the Correction of Naval Records refused to grant plaintiff's petition; but it also had its roots in this district where the court-martial proceeding was held. The cause of action for venue purposes can be said to arise wherever substantial material events took place. *Cf.* Alameda Oil Company v. Ideal Basic Indus., Inc., 313 F. Supp. 164, 168–169 (W.D.Mo.1970).

[3] In any event, defendant waived the objection

by failing to raise the venue issue in its answer or by pre-pleading motion. Fed.R.Civ.P. 12(b) (h); Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 (2d Cir. 1966); United Rubber C., L. & P. W., Local 102 v. Lee Rubber & Tire Corp., 269 F.Supp. 708, 713–714 (D.N.J.1967), aff'd, 394 F.2d 362, cert. denied, 393 U.S. 835, 89 S.Ct. 108, 21 L.Ed.2d 105 (1968); 1 J. Moore, Federal Practice ¶ 0.146 [1] [6] (1964).

III. CONTENTIONS OF PARTIES

Plaintiff's legal and factual submission can be summarized in the following syllogism:

1. A court without subject matter jurisdiction has no power to affect the status of a person before it because its purported decisions are void.

2. The court-martial had, under the holding of *O'Callahan* v. *Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), no subject matter jurisdiction.

3. The court-martial's decision that he was guilty of automobile theft was void and the dishonorable discharge predicated upon this decision must be set aside.

The government's response is:

1. When the Supreme Court spoke of lack of jurisdiction in *O'Callahan* it did not mean lack of power over the subject matter, or, if it did,

2. *O'Callahan*, as interpreted in *Relford* v. *Commandant, U.S. Disc. Barracks, Ft. Leavenworth*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971), does not exclude a case such as plaintiff's from court-martial jurisdiction, or, if it does,

3. *O'Callahan* may not be applied to court-martial convictions which became final before 1969.

IV. JURISDICTION RATONALE OF O'CALLAHAN

(4) The adjudicatory power of a court is called its jurisdiction. The term, in its primary sense, signifies power to speak the law by applying it to particular cases. If a body lacks jurisdiction over the subject matter or the parties its purported judgments are void. Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1879) McClaughry v. Deming, 186 U.S. 49, 22 S.Ct. 786, 46 L.Ed. 1049 (1902) Rosenberg et al., Elements of Civil Procedure, 143–145 (1970); Restatement (Second), Conflict of Laws, chap. 3, Introductory Note (c), 127–128 (P.O.D. Draft, Part 1, May 2, 1967) ("competence"). In recent years the term has acquired a secondary meaning: courts have been said to lack jurisdiction not because they lack adjudicatory power but because they failed to exercise their power in a proper manner. *See, e.g.,* Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel).

In criminal law this second usage has expanded greatly, in part because the remedy of habeas corpus was originally based on lack of jurisdiction. *See* Developments in the Law, Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1045–1055, 1209–1216 (1970). As habeas corpus was increasingly used to collaterally attack state and federal convictions on the ground of unconstitutional procedures leading to conviction, much of the new criminal constitutional law took on a jurisdictional cast. This new usage included such diverse matters as the right to counsel, to suppress il-

legally obtained evidence, to a jury trial and to confrontation.

Lack of precision in the use of the word "jurisdiction" creates part of the difficulty with retroactivity which is discussed in VI, *infra*. Use of the word "competence" when lack of adjudicatory power is meant, as suggested in the Restatement of Conflicts, Second, *supra*, would avoid some of the confusion but this terminology has not yet been adopted by the Supreme Court.

In analyzing the retroactivity problem some have suggested that the limitations on the exercise of court-martial power in *O'Callahan* were "functional" rather than "jurisdictional"—that is to say, the decision was based on procedural deficiencies rather than lack of power. *See, e. g.*, Schlomann v. Moseley, No. L–1003, p. 2 (D.C.Kansas, May 19, 1970); United States v. King, A.C.M. 20361 (July 30, 1969). The language of the Supreme Court makes that conclusion doubtful.

O'Callahan involved a habeas corpus proceeding challenging the jurisdiction of a court-martial to try a soldier who assaulted a girl on private property while he was on leave and in civilian clothes. The grant of certiorari was ambiguous in its use of the term jurisdiction, since the question posed was:

> "Does a court-martial * * * have jurisdiction * * * thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?" 393 U.S. 822, 89 S.Ct. 177, 21 L.Ed.2d 93 (1968).

It is not clear that the question was whether the court-martial lacked power over the subject matter and person of the soldier before it because this type of case should go to a different kind of court (classic competence jurisdiction) or whether denial of the right to a grand and petit jury without waiver caused po-

tential jurisdiction to be lost (procedural-constitutional jurisdiction).

The majority opinion is not completely lucid on the point, but a fair reading suggests that it used the phrase lack of jurisdiction to mean lack of power over the subject matter. Its major thrust is directed to the basic differences between *systems* of military and civilian courts rather than to a few defects of procedure. For example, the court speaks of "development of a system of military justice with fundamental differences from the practices in the civilian courts." O'Callahan v. Parker, 395 U.S. 258, 262, 89 S.Ct. 1683, 1685, 23 L.Ed.2d 291 (1969). The lack of juries is relied upon primarily as an illustration of these "fundamental differences." The court quoted at length from its own decision in *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17–18, 76 S.Ct. 1, 5–6, 100 L.Ed. 8 (1955), to further demonstrate such differences with respect to tenure of judges and command influence. *Id.* at 262–264, 89 S.Ct. at 1685–1686. It also relied on differences in the access of the defense to compulsory process. *Id.* at 264, n. 4, 89 S.Ct. at 1686. Differences in evidence and procedure were noted. *Id.* at 264, 89 S.Ct. at 1686.

Repeatedly the majority's use of the term jurisdiction, in context, denotes lack of power over the subject matter or person. For example, it pointed out that:

> "in examining the reach of [military court] jurisdiction, it has recognized that. * * * 'Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to *'the least possible power adequate to the end proposed.'* United States ex rel. Toth v. Quarles, 350 U.S. 11, 22–23, 76 S.Ct. 1, 8, 100 L.Ed. 8."

Id. at 265, 89 S.Ct. at 1687 (emphasis in original).

The following quotations as well as the general tenor of the opinion are consistent with this primary usage:

> "The fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense, does not necessarily imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged." 395 U.S. at 267, 89 S.Ct. at 1688.
>
> " 'Status is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." *Id.*
>
> "The jurisdiction of British courts-martial over military offenses which were also common-law felonies was from time to time extended, but, with the exception of one year, there was never any general military jurisdiction to try soldiers for ordinary crimes committed in the British Isles." 395 U.S. at 269, 89 S.Ct. at 1689.
>
> "In 1950, the Uniform Code of Military Justice extended military jurisdiction to capital crimes
>
> * * * * * *
>
> We have concluded that the crime to be under military jurisdiction must be service connected." *Id.* at 272, 89 S.Ct. at 1690.

The dissenting opinion is even more strongly pitched to the concept of jurisdiction as power to adjudicate. It deals with Congressional authority to grant jurisdiction to military courts. It rests its case on the proposition that "it is for Congress and not the Judiciary to determine the appropriate subject-matter ju-

risdiction of courts-martial." *Id.* at 276, 89 S.Ct. at 1692.

Until we are told otherwise by an appellate court we must assume that the Supreme Court used the term jurisdiction in *O'Callahan* in its classic sense to mean lack of competence to adjudicate particular categories of cases.

V. SERVICE CONNECTION

[5] In order for a military tribunal to obtain jurisdiction to try a serviceman the offense charged must be "service connected." O'Callahan v. Parker, 395 U.S. 258, 272, 89 S.Ct. 1683, 1690, 23 L.Ed.2d 291 (1969). Substituted for a "status" test—whether the defendant was a member of the Armed Forces—is what has been referred to as a "multi-factor" approach Nelson and Westbrook, Court-Martial Jurisdiction Over Servicemen For "Civilian" Offenses: An Analysis Of O'Callahan v. Parker, 54 Minn.L.Rev. 1, 24–34 (1969). Although this approach may lead to a more just result, it has increased the difficulties in determining court-martial jurisdiction.

Cognizant of the confusion possible under *O'Callahan,* the Supreme Court in *Relford* v. *Commandant, U.S. Disc. Barracks, Ft. Leavenworth,* 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971), enumerated twelve factors to be considered in deciding whether a particular crime by a serviceman is service connected They are:

> "1. The serviceman's proper absence from the base.
>
> "2. The crime's commission away from the base.
>
> "3. Its commission at a place not under military control.

"4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

"5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

"6. The absence of any connection between the defendant's military duties and the crime.

"7. The victim's not being engaged in the performance of any duty relating to the military.

"8. The presence and availability of a civilian court in which the case can be prosecuted.

"9. The absence of any flouting of military authority.

"10. The absence of any threat to a military post.

"11. The absence of any violation of military property.

"12. The offense's being among those traditionally prosecuted in civilian courts." 401 U.S. at 365, 91 S.Ct. at 655.

In *Relford* elements 1, 2, 3, 7 and 10 favored court-martial jurisdiction as did the facts that the victims of the crimes were related to servicemen on the base and property properly on the base was used in perpetrating the crimes. The Court stressed the following interests pointing strongly to service connection:

"(a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. * * *

"(b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. * * *

"(c) The impact and adverse effect that a crime committed against a person or property

on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

"(d) The conviction that Article I, § 8, Clause 14, vesting in the Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces,' means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish.

"(e) The distinct possibility that civil courts, particularly non federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary problems within its own community. * * *

"(f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.

"(g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. * * *

"(h) The mis-reading and undue restrictions of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law. [and]

"(i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post." 401 U.S. at 367–369, 91 S.Ct. at 656–657.

[6] None of these lettered interests are present in the case before us. Of the twelve factors enumerated in the Supreme Court's opinion in Relford, ten (2, 3, 4, 6, 7, 8, 9, 10, 11 and 12) clearly point away from courts-martial jurisdiction; only two—1 and 5—arguably support a finding of service connection: at the time the theft was committed plaintiff was absent without leave from his military base, and in 1944 the United States was engaged in a global war. In the circumstances of this case, neither of these two factors permits a finding of service connection.

Although the Court of Military Appeals has "tended to interpret *O'Callahan* somewhat narrowly," Note, 64 Nw.L.Rev. 930, 939 (1970), it has held that the fact that the accused was improperly absent from his military base at the time of the alleged offense does not confer jurisdiction on military tribunals. *See* United States v. Armes, 19 U.S.C.M.A. 15, 16, 41 C.M.R. 15, 16 (1969). Absence of plaintiff from his military base without leave did not confer court-martial jurisdiction, particularly since he left the base with the permission of his superiors.

That the offense was commited during World War II has more significance. A sailor imprisoned in a civilian jail awaiting trial in a civilian court is of no use to his military unit and his absence may seriously impair its fighting capacity. If he is under military custody, he can be permitted to continue to perform his duties. *See* O'Callahan v. Parker, 395 U.S. 278,

282–283, 89 S.Ct. 1683, 1696, 23 L.Ed.2d 291 (1969); Note The Supreme Court, 1968 Term, 83 Harv.L.Rev. 62, 219 n. 40 (1969).

The record does not support the inference that this plaintiff was so indispensable to his unit that civilian prosecution might have embarrassed the Navy. After his arrest he made no contribution to the war effort. He was held for trial far from his base and sentenced to confinement.

No special claim is made by the defendant under general war powers. We need not, therefore, consider that question in this case.

Two other factors that might provide a sufficient nexus to the military for court-martial jurisdiction are relied upon by the defendant, although they were not enumerated in *Relford*. First, plaintiff may have been in uniform at the time of the offense—though he denies this; second, the owner of the stolen car was a member of the Armed Forces.

In United States v. Armes, 19 U.S.M.C.A. 15, 41 C.M.R. 15 (1969), a case factually quite similar to this one, the United States Court of Military Appeals held that there was no basis for court-martial jurisdiction, even though the defendant was wearing his fatigue uniform when he stole the car, the victim was a retired army major, and the defendant was absent without leave from his base. *Id.* at 16. *Cf.* United States v. Cook, 19 U.S.C.M.A. 13, 14, 41 C.M.R. 13, 14 (1969) (dissenting opinion). In instances where the Court of Military Appeals has based court-martial jurisdiction upon the wearing of the uniform, its use has generally facilitated the crime. *See, e.g.,* United States v. Peak, 19 U.S.C.M.A. 19, 41 CM.R. 19 (1969); United States v. Morisseau, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969). Here there is no evidence that the plaintiff used his military uniform to facili-

tate the commission of the crime. The fact that the owner of the car was a member of the Armed Forces was a "happenstance" with "no military significance." United States v. Armes, 19 U.S.C.M.A. 15, 16, 41 C.M.R. 15, 16 (1969).

VI. RETROACTIVITY

Defendant's claim that *O'Callahan* should not be applied retroactively is troublesome. The Supreme Court itself has prophecied in Delphic style:

> "Some writers assert that the holding [in *O'Callahan*] must be applied retroactively. Others predict that it will not be so applied." Relford v. Commandant, U.S. Disc. Barracks, Ft. Leavenworth, 401 U.S. 355, 357, 91 S.Ct. 649, 651, 28 L.Ed.2d 102 (1971) (footnotes omitted).

Traditionally, a ruling that a court lacked jurisdiction (competence) to try a class of cases would be applied to all cases within the class, regardless of the stage of development of the litigation. Linkletter v. Walker, 381 U.S. 618, 628–629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965). This doctrine has roots deep in the history of English law. *Id.* at 622–624, 85 S.Ct. at 1734–1735. Its foundation rests on historical notions of courts as institutions and on ingrained conceptions of the judicial process as primarily law applying rather than law making. *See* Mishkin, Foreword: The High Court, The Great Writ, and The Due Process of Time and Law, 79 Harv.L. Rev. 56, 60–72 (1965). Although never completely descriptive of courts actual practice, these beliefs reflect practical and symbolic aspects of the workings of the Amerian judicial system that have not lost their vitality.

Of late the Supreme Court has begun to depart from this tradition in applying new constitutional de-

cisions controlling criminal procedure. In a limited number of instances the Court has refused to apply new rules retroactively, developing a doctrine of "prospective overruling" or "prospective limitation." *See generally* Mishkin, Foreword: The High Court, The Great Writ, and The Due Process of Time and Law, 79 Harv.L. Rev. 56 (1965); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U.Chi.L.Rev. 719 1966); Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907 (1962).

The boundaries of the new principle are, as yet, unclear and its rationale has been only sketchily developed. As Mr. Justice Harlan noted, concurring in Williams v. United States, 401 U.S. 646, 676, 91 S.Ct. 1148, 1172, 28 L.Ed.2d 388 (1971):

> "The upshot of this confluence of viewpoints was that the subsequent course of *Linkletter* became almost as difficult to follow as the tracks of a beast of prey in search of his intended victim."

See also United States v. Armiento, 445 F.2d 869, 870, n. 2 (2d Cir. 1971) ("problems in the area of retroactive application of newly-announced constitutional rulings have not found automatic resolution," citing 1971 Supreme Court decisions). A review of the many opinions in the "retroactivity" decisions this term indicates that the Supreme Court has yet to give precise guidance to the lower federal courts enabling them to predict with any assurance which rulings will not be applied retroactively. *See* Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971); Williams v. United States (Elkanich v. United States), 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971); United States v. United States Coin and Currency, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434

(1971). *Linkletter,* itself, the first attempt to justify the doctrine in its full blown form, presaged its ad hoc nature when it declared the Supreme Court's power to rule prospectively "where the exigencies of the situation require." Linkletter v. Walker, 381 U.S. 618, 628, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965).

As suggested in Part IV, *supra,* much of the doctrine's popularity has been due to the fact that it enabled the Court to avoid a difficult dilemma. Treating new criminal procedural rulings as, in a sense, constitutional-jurisdictional reduced the conceptual awkwardness in allowing them to be enforced via habeas corpus. Yet, traditional applications of the concept of lack of jurisdiction would have released prisoners who were fairly tried without any of the gains in police deterrence sought from the new rules. Limiting retroactivity reduced the outcry over release of prisoners, making practicable changes by the Supreme Court in criminal procedures grown outrageously incongruent with constitutional premises. *See* Williams v. United States, 401 U.S. 646, 676, 91 S.Ct. 1148, 1172, 28 L.Ed.2d 388 (1971) (Harlan, J., concurring).

The mixture of theory and practical considerations in determining the extent to which new rules will be applied retroactively, particularly in this time of changing personnel and views on the Supreme Court, make reasonable predictions almost impossible. In such circumstances, bearing in mind that the traditional and standard rule is still one of retroactivity and that this is particularly true where jurisdiction in the sense of lack of power over the subject matter or person is involved, a *nisi prius* court should apply the traditional rule unless it is clear that the Supreme Court will not do so.

In *Relford,* the Court just this last term refused to decide the issue of retroactive application of *O'Callahan* though it had granted certiorari on the point. Relford v. Commandant, U.S. Disc. Barracks, Ft. Leavenworth, 397 U.S. 934, 90 S.Ct. 958, 25 L.Ed.2d 114 (1970), 401 U.S. 355, 359, 91 S.Ct. 649, 652, 28 L.Ed.2d 102 (1971). In such circumstances the "task of declaring a rule's retrospective effect is better left to the only body that can speak with authority"—a higher court. Knight v. New York, 443 F.2d 415 (2d Cir. 1971).

[7] Thus we apply *O'Callahan* retroactively—though with no abiding assurance of how appellate courts will treat the issue. We are mindful of the fact that other courts which have our greatest respect have taken a contrary position. *See* Thompson v. Parker, 308 F.Supp. 904 (M.D.Pa.1970) (dictum); Gosa v. Mayden, 305 F.Supp. 1186 (N.D.Fla.1969); Schlomann v. Moseley, Civ.No. L–1003 (D.Kan. May 19, 1971); Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970) (Fergusion, J., strongly dissenting at 268–274). Learned commentators are in disagreement on the point. *Compare* Nelson and Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn.L.Rev. 1, 39–46 (1969); Note, Court-Marital Jurisdiction Limited to "Service-Connected" Cases, 44 Tulane L.Rev. 417, 423–24 (1970); Comment, 21 S.C.L.Rev. 781, 793–794 (1969) *with* Note, 64 Nw.L.Rev. 931, 938 (1970); Comment, 22 Baylor L.Rev. 64, 75 (1970); Note, 9 Washburn L.J. 193 (1970).

The decisions and commentators prospectively applying *O'Callahan* have stressed the jury deprivation aspects of that decision; they analogize to the Supreme Court decision of DeStefano v. Woods, 392

U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968). *See* Thompson v. Parker, 308 F.Supp. 904, 908 (M.D.Pa. 1970); Mercer v. Dillon, 19 U.S.C.M.A. 264, 268, 41 C.M.R. 264, 268 (1970); Nelson and Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn.L.Rev. 1, 41 (1969); Note, Court-Martial Jurisdiction Limited to "Service-Connected" Cases, 44 Tulane L.Rev. 417, 423 (1970). Recognizing that bench trials were not necessarily less fair than jury trials, *DeStefano* denied retroactive application to the newly established right of jury trial in serious state criminal prosecutions. DeStefano v. Woods, 392 U.S. 631, 633–634, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968).

This seems too restrictive a reading of *O'Callahan*. The decision rested on concern about fundamental differences in the civil and military justice system. *See* Part IV, *supra*; Note, Loyola (LA) L.Rev. 188, 200 (1970); Note, 68 Mich. L.Rev. 1016, 1017 (1970); Note, 64 Nw. L.Rev. 930, 937 (1970). *Cf.* Comment, Colum.J. of Law & Social Problems, 278, 282–311 (1971). If this discrepancy is still serious today, after the institution of the Uniform Code of Military Justice, how much more so must it have been in 1944, when this defendant was court-martialed. As noted by Senator Sam J. Ervin:

> "Prior to 1950 the American in uniform had been at the mercy of legal procedures little changed since before the Revolutionary War, procedures originally designed for mercenaries—not for citizen soldiers loath to give up the right they were defending. So antiquated and unjust was the system that after World War II a great protest came from returning veterans demanding reforms which would guar-

antee to servicemen basic principles of due process of law." 115 Cong.Rec. S 6760–61 (Daily ed. June 19, 1969).

If we are correct in believing that the Court in *O'Callahan* meant incompetence to act when it referred to lack of jurisdiction, then it is quite unlike those cases in which retroactivity has been denied. Generally, prospectivity has been used when a court with apparent jurisdiction has utilized some procedure or evidence theretofore thought proper. *See, e.g.,* Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). By contrast, the question of lack of subject matter jurisdiction has been considered unwaivable—to be raised at any point in the litigation and on the court's own motion. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530, 87 S.Ct. 1199, 1203, 18 L.Ed.2d 270 (1967); Capron v. Van Noorden, 6 U.S. (2 Cr.) 126 (1804); 1 J. Moore, Federal Practice ¶ 0.60 [4] (1964).

Even when civilian courts were loath to review any aspect of military adjudications, subject matter jurisdiction could be challenged in a collateral proceeding in the federal courts. *See, e.g.,* Hiatt v. Brown, 339 U.S. 103, 111, 70 S.Ct. 495, 498–499, 94 L.Ed. 691 (1950); McLaughry v. Deming, 186 U.S. 49, 22 S.Ct. 786, 46 L.Ed. 1049 (1902). In *McLaughry* the Supreme Court sternly emphasized the importance of jurisdiction in approving the granting of a writ of habeas corpus after a court-martial conviction by a regular army court of a volunteer. It declared that no waiver was possible:

> "The law said such a court shall not be constituted, and the defendant can not say it may, and consent to be tried by it, any more than he could consent to be tried by the first half a dozen private soldiers he should meet; and the decision of neither tribunal would be validated by the consent of the person submitting to such trial." 186 U.S. at 66, 22 S.Ct. at 793.

In light of this traditional approach to subject matter jurisdiction the prospective limitation cases dealing with newly determined procedural rights and evidentiary considerations do not provide compelling precedents.

Of the opinions considering the new doctrine, the one most in point is United States v. United States Coin and Currency, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). In *United States Coin* the government had brought an action for forfeiture of money allegedly used in illegal bookmaking operations. *See* 26 U.S.C.A. § 7302. Subsequently, the Supreme Court had voided the Internal Revenue laws that were the basis for the forfeiture. Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). The Court held that the rationale of the earlier decisions precluded collection of the forfeiture and that they must be applied retroactively. Its reason for applying traditional notions of retroactivity was that

> "even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment." United States v. United States Coin and Currency, 401 U.S. 715, 724, 91 S.Ct. 1041, 1046, 28 L.Ed.2d 434 (1971).

This concept is closely akin to subject matter jurisdiction. In *United States Coin* the conduct was immune from punishment in any court while in the instant case the conduct was punishable but not in this particular court. Both cases involve the power—jurisdiction—to act.

We appreciate the force of the arguments that the military justifiably relied on the pre-*O'Callahan* interpretation of court-martial jurisdiction and that a traditional application of that opinion might have an adverse impact on the validity of hundreds of thousands of past court-martial sentences. *See* Thompson v. Parker, 308 F.Supp. 904, 908, (M. D.Pa.1970); Gosa v. Mayden, 305 F. Supp. 1186, 1187 (N.D.Fla.1969); Mercer v. Dillon, 19 U.S.C.M.A. 264, 266–67, 41 C.M.R. 264, 266–67 (1970); Schlomann v. Moseley, Civ.No.L–1003, pp. 3–4 (D.Kan. May 19, 1971). It is not clear how many men presently incarcerated are involved, but if they have been deprived of liberty by a body lacking power to do so, they should be released. Much of the administrative burden created by applications for more favorable forms of discharge may be handled by Congressional adoption of a short statute of limitations or by administrative remedies.

Even if we are mistaken and *O'Callahan* is a case based purely on denial of the right to jury trial, so that there is no retroactivity under *DeStefano,* it is arguable that an independent constitutional right—trial in the vicinage—has been denied to this plaintiff. This right has yet to be tested and he may raise it for the first time. This is not a problem of retrospectivity as in *Linkletter,* but one of first instance adjudication as in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). *See* Comment, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 951 (1962).

Had plaintiff been tried in the civil courts in either New Jersey (where the automobile was stolen) or Pennsylvania (where it was driven), he would have been entitled to a trial in the vicinage. State v. Wyckoff, 31 N.J.L. 65, 68–69 (Sup.Ct.1864) ("The general rule of law has always been that a crime is to be tried in the place in which the criminal act has been committed); State v. Brown, 1 N.J.Misc. 377, 378 (Sup.Ct.1923) (There should be a strong reason presented to a court why * * * the indictment should be sent to another county for trial."); Pa.Const. Art. I, Sec. 9 ("In * * * criminal prosecutions the accused hath a right to * * * a speedy public trial by an impartial jury of the vicinage."); Commonwealth v. Wojdakowski, 161 Pa.Super. 250, 53 A. 2d 851, 855 (Super.Ct.1947) "(The locus of crime is always an issue, for a court has no jurisdiction of the offense unless committed in the county where tried").

The right to be tried in the vicinage has been considered fundamental since Magna Charta. Magna Charta, paras. 17, 18 ("Assizes of novel disseisin, and of mort d'ancestor, and of darrien presentment, shall not be taken but in their proper counties. * * *"). The English practice of trying colonials in England was one of the grievances mentioned in the Declaration of Independence; one of the remonstrances against the King was his "transporting us beyond Seas to be tried for pretended offenses. * * *" The right is mentioned both in Section 2 of Article III of the Constitution and in the Sixth Amendment.

The case before us demonstrates the worth of this right. Here the court-martial proceeding was held in the Brooklyn Navy Yard and plaintiff was incarcerated prior to trial on an island in Long Island Sound. How could he be expected to mount an adequate defense so many miles from the actual locus of the

alleged crime in central New Jersey or Pennsylvania? Certainly distance complicated what was, in any event, a difficult task. This factor is especially important since the Pennsylvania State Troopers may have had exculpatory information.

VII. CONCLUSIONS

Plaintiff's court-martial conviction for automobile theft must be vacated. His request that the Board for Correction of Naval Records be directed to grant him a general discharge under honorable conditions must be denied. The offense of being absent without leave in 1944 carried a permissible penalty of a bad conduct discharge. The matter is remanded to the Board with instructions to erase the conviction for automobile theft and the dishonorable discharge and to enter a discharge of no greater disapprobation than bad conduct.

We would only add that the record of the plaintiff while incarcerated at Portsmouth should be read in light of the facts of his case. If, indeed, he was innocent of the crime charged in the court-martial some bitterness is perhaps understandable and may well have militated against "rehabilitation."

The Court appreciates the assistance of counsel, particularly Michael Meltsner, Esq., and his associates, who have prosecuted, without monetary compensation, various administrative appeals and this case after appointment by the Court.

So ordered.

APPENDIX C

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of March one thousand nine hundred and seventy-two.

Present: Hon. IRVING R. KAUFMAN, Hon. WALTER R. MANSFIELD, Hon. JAMES L. OAKES, *Circuit Judges.*

UNITED STATES EX REL. JOHN W. FLEMINGS, PLAINTIFF-APPELLEE

v.

JOHN H. CHAFEE, SECRETARY OF THE NAVY, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1972